



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: LeMay et al.
Serial No.: 10/619,677
Filed: July 15, 2003
For: A BARREL FOR A TAMPON APPLICATOR ASSEMBLY AND
METHODS OF FORMING
Examiner: Stephens, Jacqueline F.
Art Unit: 3761
Confirmation No.: 7057
Customer No.: 27623

Attorney Docket No.: 460.2242USQ

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Dear Sir:

In response to the final Office Action ("Action") dated February 10, 2006, Applicant respectfully files herewith a Notice of Appeal and requests review of the present application before filing an appeal brief.

Related Appeals

The issues presented in the present application are not related to any pending appeals.

Status of the Claims

Claims 22 through 24, 26, and 27 are pending in the present application. Claim 22 is independent.

Independent claim 22 stands finally rejected under 35 U.S.C. §102(b) as anticipated by U.S. Patent No. D250,663 to Koch et al. (Koch).

Clear Errors for Review

Applicants respectfully submit that Koch fails to disclose or suggest a main section having a taper ratio of about 1.07 to about 1.15, as recited by claim 22. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). The Action asserts that Koch discloses the present invention substantially as claimed except Koch does not disclose a taper ratio. Thus, the Action concedes that Koch does not disclose or suggest all the features of independent claim 22.

In addition, the Office Action contends that Koch discloses a tampon inserter having a curved insertion tip similar in structure to the curved insertion tip of the present invention, and, therefore, it is reasonable for the Examiner to conclude the curved insertion tip of Koch would not constitute a severe curvature. Applicants respectfully disagree. Applicants respectfully submit that the proportions of features in a drawing are not evidence of actual proportions when drawings are not to scale. MPEP 2125. In addition, the application must disclose that the drawings are to scale in order for figures to be considered to scale. See *In re Wright*, 569 F.2d 1124, 193 USPQ 332(CCPA 1977). Koch does not disclose that the Figure is to scale. Furthermore, "it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue." See *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000). Thus, the patent drawings of Koch may not be relied on to show particular sizes if the specification is completely silent on the issue.

Koch, which again is a design patent, is completely silent on taper ratio, let alone a taper ratio of about 1.07 to about 1.15 of the main section, as recited by claim 22.

Moreover, paragraph 29 of the application provides that the “[b]arrel 14 is subdivided into three sections, namely an insertion tip 20, a main section 22, and a finger grip 24.” Thus, Applicants respectfully submit that a curved insertion tip of Koch does not disclose or suggest a main section having a taper ratio of about 1.07 to about 1.15, as recited by claim 22. In contrast, the ornamental design of Koch has a conventional tampon applicator barrel that is uniformly cylindrical.

The Action cites *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. Denied, 469 U.S. 830, 225 USPQ 232 (1984) that where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device. Paragraph [0038], lines 1 through 4 of the specification, provides the “tapering of the main section facilitates insertion comfort by gradually parting the vulva-vaginal channel over a longer length of barrel 14 than that of only insertion tip 20.” Thus, Applicants respectfully submit that the taper ratio of about 1.07 to about 1.15 of the main section, as recited in claim 22, performs differently than a conventional tampon applicator barrel that is uniformly cylindrical, as provided by Koch.

It is respectfully submitted that claim 22 and claims 23, 24, 26, and 27 depending therefrom, are patentably distinguishable over Koch.

Additionally, Koch fails to disclose or suggest that a maximum outer dimension is located closer to the finger grip than to the insertion tip, as recited by claim 23, that the third outer dimension is equal to the first outer dimension, as recited by claim 24, that the insertion tip has a taper ratio of more than about 0.66, as recited by claim 23, or that the plurality of petals have a petal length-to-width ratio of about 2 to about 3, as recited by claim 27. As discussed above, the Action concedes Koch fails to disclose a taper

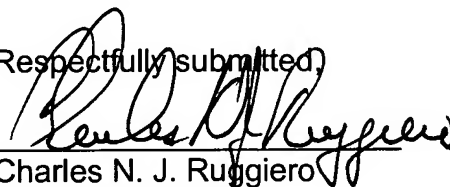
ratio. Also, the Action concedes Koch does not disclose the petal length-to-width ratio. Again, the proportions of features in a drawing are not evidence of actual proportions when drawings are not to scale, and the application must disclose that the drawings are to scale in order for figures to be considered to scale. Koch does not disclose that the Figure is to scale. Further, patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue. Thus, the single Figure in Koch may not be relied on to show particular sizes since the specification is completely silent on the issue. The Koch design specification is completely silent on taper ratio and petal length-to-width ratio.

In view of the above, it is respectfully submitted that the final rejection is clearly erroneous and, as such, the present application is in condition for allowance. Reconsideration and withdrawal of the rejection to the claims and passage of the present application to issuance are respectfully requested. Such action is solicited.

If for any reason the Examiner feels that consultation with Applicants' attorney would be helpful in the advancement of the prosecution, the Examiner is invited to call the telephone number below.

April 10, 2006

Respectfully submitted,



Charles N. J. Ruggiero

Reg. No. 28,468

Attorney for Applicant(s)

Ohlandt, Greeley, Ruggiero & Perle, L.L.P.

One Landmark Square, 10th floor

Stamford, CT 06901-2682

Tel: (203) 327-4500